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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/636,004	08/09/2000	David del Val	MS1-542US	5417
22801	7590	08/11/2005	EXAMINER	
LEE & HAYES PLLC 421 W RIVERSIDE AVENUE SUITE 500 SPOKANE, WA 99201			NGUYEN, QUANG N	
			ART UNIT	PAPER NUMBER
			2141	

DATE MAILED: 08/11/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/636,004

Applicant(s)

DEL VAL ET AL.

Examiner

Quang N Nguyen

Art Unit

2141

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 July 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 7-9, 19-24, 27-29 and 55 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 7-9, 19-24, 27-29 and 55 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 09 August 2000 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

***Detailed Action***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 05/24/2005 has been entered.

Claims 7-9 and 19 have been amended. Claims 1-6, 10-18, 25-26, 30-54 and 56 have been cancelled. Claims 7-9, 19-24, 27-29 and 55 remain for examination.

***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. **Claims 7-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bharali et al. (US 6,216,163), hereinafter referred as Bharali, in view of Payne et al. (US 6,161,201), hereinafter referred as Payne.**

4. As to claim 7, Bharali teaches a method for measuring bandwidth between two entities on a dynamic network, comprising:

via a communications network, receiving at least a pair of non-compressible packets having measurable characteristics (*via the Internet 131 of Fig. 1, receiving back to back transmission of small packets of 100 bytes and large packets of 700 bytes, whose types are chosen to be non-compressible*) (Bharali, col. 8, lines 8-14);

calculating bandwidth based upon, measurable characteristics of at least the pair of non-compressible packets (*calculating the transmission rate for the small and large messages*) (Bharali, col. 8, lines 25-33).

However, Bharali does not explicitly teach determining if the calculated bandwidth is outside a given range of believability for calculated bandwidth, then querying a modem of an entity about a bandwidth setting of the modem.

In a related art, Payne teaches a method and system for concurrent interaction with a modem having an open connection wherein a host system 34 coupled via modem 36 to a landline communication channel, may experience performance less than desirable then the connection monitor 40 may consult with modem 36, by querying the modem 36 (*i.e., may experience/determine the calculated bandwidth is outside a given range of believability, then querying a modem of an entity about a bandwidth setting of the modem*), to deduce or establish a reduced data transfer rate as negotiated by the remote modem (Payne, Fig. 2 and col. 8, lines 13-29).

Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to include querying a modem of an entity about a bandwidth setting of the modem if the calculated bandwidth is outside a given range of believability since such methods were conventionally employed in the art to determine the change in the data transfer rate allowing a user to react accordingly to enable a user to diagnose and solve throughput problems such diminished bandwidth capabilities or high error rates inherent to wireless communication channels (Payne, col. 8, lines 25-29).

5. As to claims 8-9, Bharali-Payne teaches the method of claim 7, wherein the queried modem is a modem of a receiving entity (*modem 36 of Fig. 2*) or a modem of a sending entity (*the connection monitor 40 may request a status information from a remote modem, i.e., may query a modem of sending entity*) (Payne, col. 5, lines 40-50).

6. **Claims 19, 21-24, 27-29 and 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bharali, in view of Linzer et al. (US 6,005,621), herein after referred as Linzer.**

7. As to claim 19, Bharali teaches a method for measuring bandwidth between two entities on a dynamic network, comprising:

via a dynamic network (*via the Internet 131 of Fig. 1*), sending at least a pair of non-compressible packets (*sending back to back transmission of packets whose types*

*are chosen to be non-compressible*), the dynamic network being a communications network having no assurance that both packets of a pair of identical packets are handled in an identical manner while in transit on the communications network (Bharali, col. 8, lines 8-14);

receiving a bandwidth calculation based upon measurable characteristics of at least the pair of non-compressible packets (*receiving the calculated transmission rate for the small packets of 100 bytes and large packets of 700 bytes*) (Bharali, col. 8, lines 25-33).

However, Bharali does not explicitly teach selecting and sending a file formatted for the given calculated bandwidth that is equal to or less than the bandwidth calculation.

In a related art, Linzer teaches a video server delivering high-resolution video over high bandwidth connections and low-resolution video over low bandwidth connections (Linzer, col. 7, lines 48-57).

Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to include choosing appropriately formatted files for a given bandwidth as taught by Linzer in the Bharali invention because it would allow the system to deliver the appropriate version of a file formatted for the corresponding provided bandwidth in providing high quality of service (QoS) to users based on their bandwidth connections (Linzer, col. 3, lines 1-15).

8. As to claim 21, Bharali-Linzer teaches the method of claim 19, wherein the packets are non-compressible packets. Examiner would like to note that entropy, in the information theory field, is defined as the randomness of data in a set, wherein the more random the data is the higher the entropy. Since data compression depends on patterns in data, higher randomness of data correlates to lower compression ratios. Therefore, it is inherent that non-compressible packets have a highly entropic.

9. As to claims 22-23, Bharali-Linzer teaches the method of claim 19, wherein each of the pair of non-compressible packet is formatted for TCP/UDP (*packets are transmitted during the TCP slow start phase and the TCP congestion Avoidance Condition represent conditions under which servers transmits packets back-to-back*) (Bharali, col. 9, line 65 – col. 10, line 2).

10. As to claim 24, Bharali-Linzer teaches the method of claim 19, wherein the packets of the pair are equivalent in size (*both packets of 1500 bytes*) (Bharali, col. 10, lines 23-26).

11. As to claim 27, Bharali-Linzer teaches the method of claim 19, further comprising selecting one of the pair of non-compressible packets from a set of different non-compressible packets (*among messages of 100 bytes, 700 bytes, or 1500 bytes*).

12. As to claim 28, Bharali-Linzer teaches the method of claim 19, before sending, further comprising generating the pair of non-compressible packets (*inherently, the packets are generated before sent*).

13. Claim 29 is a corresponding computer-readable medium claim of method claim 19; therefore, it is rejected under the same rationale.

14. As to claim 55, Bharali-Linzer teaches the method of claim 19, wherein the dynamic network is the Internet (Bharali, the Internet 131 of Fig. 1).

**15. Claim 20 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bharali-Linzer, in view of Takagi et al. (US 6,272,148), herein after referred as Takagi.**

16. As to claim 20, Bharali-Linzer teaches the method of claim 19, but does not explicitly teach each of the pair of non-compressible packets is approximately fragmentation-avoidance size.

In a related art, Takagi teaches a network system that utilizes packets that are the maximum size, wherein they can be transferred without fragmentation (Takagi, col. 3, lines 9-18).



Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to make the packets the largest size possible while avoiding fragmentation as taught by Takagi in the Bharali's invention because it would avoid spending wasteful processing time and improve throughput, i.e., giving a better estimate of the actual bandwidth between two entities (Takagi, col. 3, lines 18-23).

17. Applicant's arguments as well as request for reconsideration filed on 05/24/2005 have been fully considered but they are moot in view of the new ground(s) of rejection.

18. Further references of interest are cited on Form PTO-892, which is an attachment to this office action.

19. A shortened statutory period for reply to this action is set to expire THREE (3) months from the mailing date of this communication. See 37 CFR 1.134.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Quang N. Nguyen whose telephone number is (571) 272-3886.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's SPE, Rupal Dharia, can be reached at (571) 272-3880. The fax phone number for the organization is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
RUPAL DHARIA  
SUPERVISORY PATENT EXAMINER